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IN THE

Supreme Court of the United States

October ~~March~~ Term, 1947
No. 657

UNITED STATES OF AMERICA, *ex rel.* FREDERICK HEINRICH WEDDEKE,

Petitioner,

against

W. FRANK WATKINS, as District Director of Immigration and Naturalization,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

GUNTHER JACOBSON,
Counsel for Petitioner.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
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PETITION FOR WRIT OF CERTIORARI

Proceedings Below

The petitioner, Frederick Heinrich Weddeke, prays for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Second Circuit, made and entered on the fourth day of February, 1948, affirming an order of the United States District Court for the Southern District of New York, made and entered on December 26, 1938, which order dismissed a writ of habeas corpus and remanded the petitioner to the custody of the respondent.

The petitioner, a German alien, on October 31, 1947, sued out a writ of habeas corpus to test the legality of his

detention in deportation proceedings at Ellis Island. Argument on the pleadings, consisting of the petition for the writ, the return thereto, and the traverse, was had in the motion part of the United States District Court for the Southern District of New York, Judge Simon H. Rifkind sitting, on December 19, 1947. Judge Rifkind, from the bench, directed the entry of an order dismissing the writ and remanding the relator to the custody of the respondent. No evidence was received by the judge and no opinion rendered by him. The Circuit Court of Appeals, upon petitioner's appeal, unanimously affirmed the order of the District Court. Its opinion appears at pages 27 to 36 of the record. This opinion has not yet been reported.

Jurisdiction

The order of the Circuit Court of Appeals was rendered and entered on the 4th day of February 1948 (R. 27). The jurisdiction of this court is invoked under Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

Statement of Facts

The petitioner, a native and citizen of Germany, last entered the United States as a stowaway on December 9, 1926, without an immigration visa. He has never been admitted to this country for permanent residence. He is therefore subject to deportation under 8 U. S. C. Secs. 155 (a), 213, and 214.

The petitioner in 1927 was married to Philomena Serzo, at Far Rockaway, New York. His said wife is a citizen of

the United States by birth. There are six children of said marriage, all of whom are native citizens of the United States (R. 6). Petitioner therefore in the deportation proceeding invoked the provision of 8 U. S. C. Sec. 155 (c), authorizing the Attorney General to suspend deportation of an alien otherwise deportable, who proves good moral character for the past five years, if the Attorney General finds that such deportation would result in serious economic detriment to a citizen spouse or minor child of such deportable alien.

The petitioner on June 18, 1942, was upon his plea of guilty convicted by the County Court of Nassau County, New York, to from five to ten years in the penitentiary upon an indictment charging him with the crime of incest with his twelve year old daughter Anna. The petition for habeas corpus herein alleges that the petitioner was convicted as aforesaid in violation of the Fourteenth Amendment of the Constitution of the United States and of Art. 1 Sec. 6 of the Constitution of the State of New York; that petitioner was inveigled to plead guilty, without the advice of counsel, by persuasion of the District Attorney, and that said plea was made in confusion, despair, and without understanding of the nature of the charges (R. 6). The petition also alleges that the petitioner was innocent of the charges as shown by affidavits of petitioner's wife and his daughter, Anna, which are annexed to the petition (R. 12 to 15).

The petition for habeas corpus further alleges that petitioner was accorded a deportation hearing by an Inspector of the Immigration and Naturalization Service in

New York City on December 5, 1946, but that the relief of suspension of deportation, for which he had applied, was denied him on the ground that his conviction as aforesaid was proof of his bad moral character (R. 7).

The petition for habeas corpus further alleges that the deportation proceeding before the Immigration and Naturalization Service were unfair, arbitrary, capricious and contrary to law in that

(a) the conviction of the petitioner was obtained by false accusations on the part of his said wife and daughter, and by the importunities on the part of the District Attorney, and that the petitioner was cajoled into pleading guilty, though in fact he was innocent (R. 6 and 7);

(b) after his arrest under the warrant of deportation herein, petitioner made an application for a stay of deportation to the Immigration Service, so that he could re-open his conviction in the Nassau County Court or make a pardon application to the Governor of the State of New York, but that the Immigration and Naturalization Service, acting for the Attorney General, denied this relief, stating as a reason for such denial the severe nature of the crime of incest (R. 8);

(c) the Immigration Inspector in the deportation hearing of December 5, 1946, persuaded the petitioner to proceed without the advice of counsel and falsified the minutes of said hearing (R. 8 and 9);

(d) counsel of the petitoner had been refused an examination of the files of the Immigration Service prior to the institution of the hebeas corpus proceeding in the

District Court, contrary to Sec. 95.6 (e) Code of Federal Regulations (R. 9).

The traverse herein further alleges that the majority of counts of the indictment of petitioner had been without bases in law in that they were found without the corroborating evidence prescribed by section 2013 of the Penal Law of the State of New York and that the County Court should not have accepted the plea of guilty for that reason. (R. 20 and 21).

The government return denies none of these allegations, but takes the position that the petition for habeas corpus does not allege facts entitling the petitioner to the relief demanded by him.

It is contented on behalf of the petitioner that on the face of the pleadings this German alien, ignorant of our laws and safeguards of liberty, has been illegally deprived of his rights and of his liberty, and that the courts below erred grievously in denying him in this habeas corpus proceeding a hearing on the merits in which evidence to prove his allegations could be offered.

The Circuit Court of Appeals rendered a decision (R. 27 to 36) whose highlights are:

(1) (R. 35) That assuming all other prerequisites to the exercise of favorable discretion under 8 U. S. C. Sec. 155 (c) are present, it is no abuse of discretion, if a denial of suspension of deportation is predicated upon a judgment of conviction of a crime tainted with moral turpitude, even though it be alleged or proved that the judgment is a nullity because, for violation of constitutional rights, the convicting court had no jurisdiction.

A judgment void as aforesaid may be the sole basis of denying "good moral character", and the Attorney General or those to whom he delegated his powers, the Immigration Service, are justified in ruling "that they would not go behind the judgment of conviction * * *"

(2) (R. 36) That it was no legal error or abuse of discretion for the Immigration Service, after a warrant of deportation had been properly issued, to deny the petitioner's application for a stay of deportation, which was sought to enable him to apply to the Governor of the State of New York for a pardon or to bring legal proceedings to re-open the judgment of conviction.

(3) (R. 36) That the claims of procedural error in the administrative hearing (inducement to waive counsel, falsification of the minutes of the administrative hearing, refusal to let counsel examine the files) raised no issues in the present habeas corpus proceeding and did not entitle the petitioner to a vacation of the warrant of deportation, nor justify that he failed to attack the conviction as unconstitutional before the issuance of the warrant of deportation.

Questions Presented

It is on the basis of the foregoing opinion that this petition presents questions of constitutional and administrative law, and of protection of Civil Liberties, that far transcend the fate of the individual involved in this case. These questions are:

(1) Is a conviction lac[illegible] element of due process and therefore violative of th[illegible]rteenth Amendment of the Constitution, an absolute nullity?

(2) Is such nullity a nullity for all purposes, so that it may be invoked in a deportation proceeding in which favorable discretion has been denied on the ground that such void conviction is proof of bad moral character, or can the administrative agencies refuse to go behind such void judgment and declare themselves bound by it?

(3) Do the allegations in the petition: That in the (administrative) deportation proceeding the petitioner was induced to waive counsel; that the minutes of the hearing were falsified: that counsel of petitioner was refused examination of the files prior to the present habeas corpus proceeding; raise the issue of lack of due process of the administrative proceedings and nullify such proceedings?

(4) Was, in view of the irregularities of the deportation proceeding as alleged in the petition for habeas corpus, the issue of unconstitutionality of the conviction in the Nassau County court timely raised in an application to the Immigration Authorities after a warrant of deportation had issued?

(5) Was, in view of the issues raised by the petition and traverse, which were not controverted by the return of the government, the District Court justified in dismissing the writ of habeas corpus on the pleadings, i.e. without hearing the evidence which petitioner was anxious to offer?

Reasons for Granting Writ

1. The court below decided important questions of federal law, which have not been, but should be settled by this court to wit:

a. The Attorney General denied suspension of deportation to a person otherwise deportable on the ground that a conviction for incest in 1942 was proof of lack of good moral character.

Query: Does the petitioner's allegation that the conviction was unconstitutional raise a substantial issue of fact?

The decision hinges upon a construction of Section 155 (c), 8 U. S. C., where suspension of deportation is made discretionary with the Attorney General. It is contended that this discretion is illegally exercised in the negative if expressly based upon the fallacious ground of a conviction which petitioner claims was in violation of the U. S. and N. Y. constitutions and therefore a nullity.

The decision hinges further upon a construction of the Administrative Procedure Act of 1946 (see Point II of brief, ~~Subdiv. (f)~~, p. 14 below) which requires that administrative adjudications must be based on "substantial evidence". It is contended that an unconstitutional conviction is no "substantial evidence" of lack of good moral character.

b. The petition herein alleges that a number of events occurred in the administrative (deportation) proceeding which deprived the petitioner of due process in said proceeding.

Query: Is the administrative proceeding reviewable on this ground?

In view of the defects of the administrative proceedings (inducement by the inspector that petitioner waive counsel, falsification of minutes, denial of counsel's request to examine files), was petitioner's offer to prove the unconstitutionality of his conviction timely made by motion to reopen after a warrant of deportation had issued? (see Points IV and V of brief.)

There is apparently no decision of this court construing this phase of the pertinent Rules and Regulations of Title 8 of the Code of Federal Regulations.

2. The decree herein of the Circuit Court of Appeals for the Second Circuit is in conflict with a decision of the Circuit Court of Appeals for the Seventh Circuit.

The Circuit Court of Appeals for the Second Circuit in the present case (R. 36) held:

> "* * * all the Immigration Service did in this case was to rule that they would not go behind the judgment of conviction, which they would have to do in order to justify suspension of deportation."

The Circuit Court of Appeals for the Seventh Circuit in *U. S. ex rel. Freislinger* v. *Smith*, 41 F. (2) 707, upon habeas corpus in a deportation case held that where a judgment of conviction of an alien was void, the alien would not be deported on the ground of such conviction. Said the Court by Sparks, C. J. (p. 708):

> "Thus we have a judgment which, under the Illinois authority cited, the court had no jurisdiction

to render, and it is void * * *. We think the judgment, under the Illinois authorities, is not only erroneous, but void * * *.

"But in the instant case Kappel has served almost four years under the void judgment, and by virtue of this service, under the Illinois law, it is too late to correct judgment. *People* v. *Whitson*, 74 Ill. 20 * * *.

"Judgment reversed, with direction to discharge Kappel."

It is contended therefore that the two decisions are contradictory with respect to the most crucial point of this case: Whether or not the Immigration Service has the duty of going behind a judgment of conviction which is claimed to be nullity on account of unconstitutionality.

The petitioner therefore prays for certiorari in accordance with Rule 5 (b) of this court.

New York City, March 8, 1948.

Respectfully submitted,

GUNTHER JACOBSON,
Counsel for Petitioner.

Supreme Court of the United States

March Term, 1948

No.

UNITED STATES OF AMERICA, *ex rel.* FREDERICK HEINRICH WEDDEKE,

Petitioner,

against

W. FRANK WATKINS as District Director of Immigration and Naturalization,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The petitioner has submitted a petition for a writ of certiorari, containing among other things statement of facts, of the opinion below, jurisdiction, questions presented, and reasons for granting the writ. Additional facts will be stated in the brief herewith presented.

POINT I

Where the petition for a writ of habeaus corpus and the subsequent pleadings present issues of fact, a plenary hearing has to be granted by the District Court at which the petitioner may offer evidence to prove his allegations.

In the present case, the writ of habeas corpus was dismissed by the District Court on the pleadings without a plenary hearing, although the following issues of fact had been raised:

(1) That petitioner had been defrauded and cajoled into pleading guilty to the crime of incest in 1942, without the assistance of counsel, and although he was innocent of the crime with which he had been charged.

(2) That in the warrant proceedings for deportation he was denied suspension of deportation on the ground that the said conviction proved his lack of good moral character.

(3) That he was denied a stay of deportation for which he had applied so that he would be able to reopen the criminal case.

(4) That he was persuaded by the Immigrant Inspection to waive counsel, that the minutes of the Immigration hearing had been falsified, that, subsequently, petitioner's counsel was denied access to the files of the Immigration and Naturalization Service.

Assuming that these allegations raised relevant and material issues in the habeas corpus proceeding, the District Court should have held a plenary hearing. This was mandatory under the decision of this Court in which it was held, in *Walker* v. *Johnston*, 312 U. S. 275, by Mr. Justice Roberts:

> "The District Court proceeded to adjudicate the petitioner's rights to the writ upon the allegations of his petition and traverse and those of the return and accompanying affidavits. Thus the case was disposed on *ex parte* affidavits and without the taking of testimony. The practice thus to dispose of application of habeas corpus on matters of fact as well as of law has been followed in the Ninth and Tenth Circuits.
>
> "In the other circuits, if an issue of fact is presented, the practice appears to have been to issue the writ, have the petitioner produced, and hold a hearing at which evidence is received. This is, we think, the only admissible procedure. Nothing less will satisfy the command of the statute that the judge shall proceed to determine the facts of the case, by hearing the testimony and arguments."

POINT II

The Administrative Procedure Act enlarged the power of the courts to review administrative decisions of the Immigration and Naturalization Service.

Court review of deportation proceedings is now regulated by the Administrative Procedure Act of June 11, 1946. That the said act applies to proceedings in the Immigration and Naturalization Service, is apparent from House Report No. 1980 of May 3, 1946, of the House Committee on the Judiciary, United States Code Congressional Service, 1946, page 1199, which expressly states that "The Department of Justice (Immigration and Naturalization Service)" was one of the agencies studied by the committee when it prepared the bill which subsequently became the Administrative Procedure Act. Reference is also made to the definitions contained in section 2 of said act reading:

> "Sec. 2. As used in this act—
>
> "(a) Agency—'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, the governments of the possessions, territories, or the District of Columbia * * *."
>
> * * *
>
> "(f) Sanction and relief.— 'Sanction' includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimburse-

ment, restitution, compensation, costs, charges of fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. 'Relief' includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

"(g) Agency proceeding of action.— 'Agency proceeding' means any agency process as defined in subjections (c), (d), and (e) of this section. 'Agency action' includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

Two things are clear on the face of this section: That deportation proceedings are embraced therein and that "agency action" and "agency proceeding" under subsection (g), just quoted, comprises any kind of relief denied including "discretionary relief".

The problem of Judicial Review is dealt with in Sec. 10 of the Act, reading in part:

"(e) Scope of review.— So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, ca-

pricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; (6) unwarranted by the facts to the extent that the facts are subject to trial to move by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

The Court will notice that the courts have power to set aside agency action, findings and conclusions found to be

(1) arbitrary, capricious, *an abuse of discretion;*

* * *

(4) without observance of procedure required by law;

(5) unsupported by substantial evidence * * *;

(6) unwarranted by the facts.

The Court will notice that the abuse of discretionary powers is subject to court review, and it is contended that discretionary powers are abused where, as in the present instance, discretionary relief is denied on untenable grounds. The petition herein alleges under 8 (R. 7): "Suspension of deportation was denied him (petitioner) on the ground that his conviction as aforesaid is proof of the bad moral character." It alleges specific facts showing that his (petitioner's) plea of guilty was obtained from him

by tricks and undue influence. It alléges that the petitioner was willing to prove his innocence of the crime charged, and affidavits of petitioner's wife and daughter were submitted showing that the charges brought by them, six years ago, against this relator were false and untrue. If the conviction was unconstitutional and a nullity as it is claimed (see Point IV below), the decision of the Board of Immigration Appeals is based on incompetent evidence, and should be set aside.

In this connection it seems proper to refer to the scope of court review of an administrative decision as enlarged by the Administrative Procedure Act. The Court's attention is directed to Judge Holtzoff's decision in *Lindenau* v. *Watkins,* 73 F. Supp. 216, 219, reading:

> "In other words, the Administrative Procedure Act does not in any way modify the existing forms of proceedings to review final actions of administrative agencies, nor does it create any new remedies if an adequate remedy is in existence.
>
> "A different question, however, is presented in dealing with the scope of review as distinguished from the nature of the remedy. Section 10 (c), which governs this matter, reads as follows:
>
> "'(c) Scope of review. So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings and conclusions, and abuse of discretion,

or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction authority, or limitations, or short of statutory right; (4) without observance of procedure acquired by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.'

"(2) The vital provision of the foregoing section, for the purpose of this proceeding, is found in Clause (5) which empowers the court to determine whether the findings of fact made by the administrative agency are supported by substantial evidence, and to set them aside if its conclusion is in the negative. The statute contains no exception to this provision. Consequently, in those cases in which the scope of judicial review had been restricted within narrower bounds, it was enlarged to that extent. In reviewing administrative findings, the court must always determine whether the findings are supported by substantial evidence. It is no longer sufficient, as has been true in some instances, that the findings be supported by some evidence. The result is that in habeas corpus proceeding to review a deportation or exclusion order of the immigration authorities, it is not enough that there be some evidence to sustain the findings of fact. They must be supported by sub-

> stantial evidence. If the court reached the conclusion that there is no substantial evidence to sustain the findings, they must be set aside."

The decision further holds:

> "The following principles may be deduced from the foregoing authorities: Substantial evidence is evidence of such quality and weight as would be sufficient to justify a reasonable man in drawing the inference of fact which is sought to be sustained. It implies a quality of proof which induces conviction and which makes a definite impression on reason. It must be more than a scintilla of evidence, and more than suspicion or surmise. It must be more satisfying than hearsay or rumor. Mere rags and tatters of evidence are not sufficient. Some courts have gone as far as to say that evidence subject to either one of two inferences is not substantial. The test in determining what constitutes substantial evidence in an administrative proceeding, is the same as that applied in trials by jury."

On the basis of these principles, it is submitted that the decision of the administrative agencies is unsupported by substantial evidence in that it considered a conviction which was unconstitutional and a nullity and in that an unverified hearsay report of a probation officer (petition, par. 9e (R. 9)) was used as evidence on which however the decision of the administrative agencies was not based. In addition to this the other defects of the deportation proceeding, alleged in this petition, which are not denied in the government return, should be considered.

It follows that the warrant of deportation herein should be set aside if court review shall reveal that the decisions of the administrative agencies were unsupported by substantial evidence.

POINT III

Inducement by the presiding inspector of the Immigration and Naturalization Service that the deportee waive counsel, falsification of the minutes of the hearing before the inspector, refusal of the Service to let counsel examine the files, are sufficient cause to set aside a Warrant of Deportation based upon such proceeding.

The Circuit Court, with respect to the allegations of the petition summarized in the caption of this point held, at the end of its decision (R. 36):

> "Appellant has made certain other claims of procedural errors in the administrative hearing. We have considered them, and find them without merit."

In opposition to this holding the Court is respectfully referred to the following sections of the Code of Federal Regulations, Title 8, as amended and republished on July 30, 1947, in the Federal Register of July 31, 1947, p. 5065, *et seq.* It is there provided in section 150.6 (c):

> "Procedure; notice of charges. At the beginning of a hearing under a warrant of arrest, the presiding inspector shall * * * (2) apprise the alien, if not represented by counsel, that he may be so represented if he desires and require him to state then and there for the record whether he desires counsel; * * *"

It is respectfully submitted that the allegation of the petition for habeas corpus that the inspector persuaded the petitioner to waive counsel is material and relevant and raises, if denied, an issue of fact. The government return

fails to deny this allegation. On the basis of this allegation alone the petitioner should have been granted a new warrant hearing.

Said Code of Federal Regulations, Title 8, further holds in Section 150.6 (b):

> "The presiding inspector * * * shall further make sure that * * * the record is a verbatim record report of everything that is stated during the course of the hearing * * *."

It is submitted that the allegation of the petition for habeas corpus that the record is untrue raises a material issue of fact which, if proved, ought to lead to a vacation of the warrant of deportation and to the granting of a new warrant hearing. Again the government return herein does not deny this allegation of the petition.

Said Code of Federal Regulations, Title 8, further holds in section 95.6 (b):

> "During the time a case is pending the attorney or representative of record, or his associates, shall be permitted to review the record and, upon request, be lent a copy of the testimony adduced * * *."

The petition for habeas corpus herein (R. 9) alleges that the petitioner never was given a copy of the minutes of the deportation hearing although he had asked for one on December 5, 1946, and that the undersigned attorney was refused permission to examine the record of the Immigration Service. At that time the case was "pending" before the Service as the petitioner was in custody at Ellis Island for deportation and applications to reopen and for a stay

of deportation were pending. The application for stay of deportation was made pursuant to Section 1.42 (e) of the Code of the Federal Regulations, and the application to reopen pursuant to Section 150.8 of the Code of Federal Regulations, Title 8.

It is submitted that this allegation again charges a substantial violation of procedural rights, which is based on more than the alien's word: on the sworn statement of the undersigned that he was refused review of the record. The government return does not deny these charges.

All these allegations sum up to the distressing fact that the Immigration and Naturalization Service committed said violations of its own Rules and Regulations to such extent that an improper zeal to deport this petitioner without due process is exposed.

This Court is prayed to restore justice to this indigent German.

POINT IV

A judgment of conviction in violation of constitutional rights is a nullity for all purposes, and a finding of the Immigration Authorities that a deportee failed to prove good moral character, if based upon such illegal conviction, must be set aside in a habeas corpus proceeding.

A.

That a judgment of conviction in violation of constitutional rights is a nullity has been established by the decisions of this Court and of the courts of the State of New York.

In *Canizio* v. *People of the State of New York*, 327 U. S. 82, 66 S. Ct. 452, the petitioner equally invoked Article 1,

Section 6 of the Constitution of the State of New York and the Fourteenth Amendment to the United States Constitution, alleging in a motion, *coram nobis,* that he had been convicted of robbery in the first degree upon his plea of guilty, without the advice of counsel and without being advised of his right to counsel. This Court, by Mr. Justice Black rendering the opinion of the Court, held on page 85:

> "* * * had there been nothing to contradict petitioner's general allegation that he was not represented by counsel in the interim between his plea of guilty and the time he was sentenced, his charges would have been such as to have required the Court to hold a hearing on his motion."

In other words the allegations in Canizio's motion papers were held such as to vitiate the conviction and make it a nullity, had they been uncontradicted (as they are in this case).

Mr. Justice Murphy, in his dissenting opinion on page 89, ibid., similarly states that where a conviction was had without due process and in violation of both the Fourteenth Amendment and of Article 1, Section 6, New York Constitution:

> "The arraignment and the plea of guilty were thereby vitiated, from which it follows that the conviction was inconsistent with due process of law."

Similarly this Court in *Brown* v. *State of Mississippi,* 297 U. S. 278, 56 S. Ct. 461, on page 287, by Mr. Chief Justice Hughes, unequivocally held:

> "The conviction and sentence were void for want of essential elements of due process, and the pro-

ceedings thus vitiated could be challenged in any appropriate manner."

The petitioner herein therefore concludes that, upon the uncontradicted allegations of the petition for habeas corpus, the alleged facts showing that his conviction in 1942, of the crime of incest was void, that it could be challenged in any appropriate manner, and that it was appropriate to challenge it in the deportation proceeding and subsequently in this habeas corpus proceeding in the Federal Courts. The holding of the Circuit Court here is, that the Immigration Service in adjudicating petitioner a person who failed to show good moral character did not have to go behind the (void) judgment of conviction, is erroneous.

B.

Inasmuch as the judgment of conviction herein is a decision of a court of the State of New York, it seems appropriate that to show that, upon the allegations of the petition for habeas corpus herein which were not contradicted by the return of the government, the judgment of conviction was also void under New York Law.

Article 1, Section 6, paragraph 3 of the Constitution of the State of New York, as amended on November 8, 1938, reads:

> "No person shall be deprived of life, liberty or property without due process of law."

Reference is further made to the case of *Lyons* v. *Goldstein,* 290 N. Y. 19, where the Court of Appeals of the State of New York considered the question whether a judgment of conviction could be set aside, after the times to

appeal had expired, where a person restrained of his liberty under such judgment (p. 23):

> "asserts that the judgment is null and void because his plea of guilty to the crime charged, which forms the basis upon which the judgment was entered, was induced by bribery, deceit, coercion or fraud and misrepresentation * * *."

The Court of Appeals decided that such assertion could properly be made, citing with authority, among other cases, the decisions of this court in *Mooney* v. *Holahan,* 294 U. S. 103, 55 S. Ct. 340; *Walker* v. *Johnston,* 312 U. S. 275, 61 S. Ct. 574; and *Waley* v. *Johnston,* 316 U. S. 101, 62 S. Ct. 964.

It therefore is apparent that the law of the State of New York is exactly in conformity with the construction given the due process clause of the Fourteenth Amendment by the decisions of this court.

C.

Having thus established that a judgment of conviction in violation of constitutional rights is a nullity, it is still left to show that the petitioner may still attack such void judgment of a state court in a habeas corpus proceeding challenging the validity of a warrant of deportation based on such void judgment. This question has been answered in the negative by the Circuit Court of Appeals, Second Circuit, in the present case while the U. S. Circuit Court of Appeals, 7th Circuit, in the case of *U. S. ex rel. Freislinger* v. *Smith, supra,* p. 9, answered it in the affirmative.

The main reason why the decision of the Circuit Court for the Seventh Circuit should be sustained is that the petitioner has served his sentence, and being released from

jail can possibly no more have recourse to habeas corpus or *coram nobis* proceedings in the State Courts. Furthermore, in order to proceed in the state courts the petitioner needs time and release from his present custody. If he is shipped out of the country before he can carry through such proceedings that may extend over a year or more, he is practically deprived of these remedies in the state courts. The petition for habeas corpus herein (R. 8), expressly alleges that the petitioner requested the Immigration Service to stay deportation so that he might pursue his state remedies, and that this request was denied because of the severe nature of the crime with which petitioner was charged. The present habeas corpus proceeding was therefore the only remedy open to the petitioner in which he could attack the unconstitutional conviction. The holding herein of the Circuit Court for the Second Circuit that the Immigration Service did not have to go behind the allegedly void conviction therefore deprived the petitioner of his right under the constitution.

POINT V

The nullity of the conviction may be raised in deportation proceedings after the deportation hearing.

The decree of the Circuit Court herein further holds that (R. 34):

> "It cannot be said that the Immigration Service acted arbitrarily or capriciously in the exercise of a discretionary power by refusing to suspend deportation in the face of a judgment of a court of competent jurisdiction, convicting the alien, upon a plea of

> guilty, of the crime of incest within the five-year period; at least if the alien made no offer at the hearing conducted by the Immigration Service to prove the judgment of conviction was void as the result of denial to the alien of his constitutional rights at the original trial."

The Circuit Court in this part of the decision overlooked the fact that the petition for habeas corpus herein alleges quite clearly that the petitioner in the deportation hearing was again persuaded to proceed without counsel and that other violations of due process were committed in the deportation proceeding, so that said proceeding is also a nullity. The petition for habeas corpus further alleges that when counsel for the petitioner finally raised the issue and asked for a stay of deportation and examination of the files, these applications were denied. Under the circumstances of the case therefore, it must, on the face of the pleadings, be held that they entitle the petitioner to relief by writ of habeas corpus.

If it shall still be found that here or there a fact should have been alleged more explicitly in the pleadings, the petitioner invokes the holding of this court in *Holiday* v. *Johnston,* 313 U. S. 342, 350, 351, 550; 61 S. Ct. 1015:

> "A petition for habeas corpus ought not to be scrutinized with technical nicety. Even if insufficient in substance, it may be amended in the interest of justice."

The proceedings before the Immigration and Naturalization Service are administrative and not supervised and directed by learned judges. Mistakes in complex cases are made by government officials and by aliens. The Rules and

Regulations of the Service anticipate such human shortcomings and provide for them. The court's attention is respectfully directed to the following sections of Title 8 of the Code of Federal Regulations:

Section 1.42, giving the Commissioner of Immigration power to grant:

> "(e) Requests for stay of execution of a warrant of deportation;"

Section 150.8:

> "Reopening the hearing. At any time prior to the forwarding of the record of hearing to the Commissioner the office in charge of a district or suboffice may direct that a case be reopened for proper cause. The Commissioner may direct a reopening of the record of hearing for proper cause at any time prior to such time as an appeal from his order may be entered in accordance with the provisions of Section 90.3 (a) of this chapter. Requests by aliens or their representatives for a reopening of a hearing prior to entry of a final order shall be in writing, stating the new facts to be proved, and be supported by affidavits or other evidentiary material. All requests for reopening must be filed with the appropriate field office of the Immigration and Naturalization Service. If the record of hearing has been forwarded to the Commissioner from that office, the request for reopening shall be forwarded to the Commissioner. The Commissioner shall grant or deny the request if the case is pending before him. If the case is pending before the Board of Immigration Appeals, the request shall be forwarded to the Board. The Board shall consider the request and either remand the case for further hearing or deny the request and render a decision on the record."

Hearings may be reopened, it appears, at all stages of the proceeding.

Further provisions for the reopening of cases are contained in Section 90.11 (b) reading:

> "Reconsideration or reopening of any case in which an order has been entered by the Board of Immigration Appeals (except as provided in Section 150.11 b of this chapter) * * *, whether requested by the Commissioner or by the party against whom the order is effective or his counsel or representative, shall be only upon written motion. The Board may, in its discretion, grant or deny such motion, and pending its consideration of the motion may stay deportation. A motion to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. A motion to reconsider shall state the reasons for reconsideration and shall be supported by such precedent decisions as are pertinent. Motions shall be filed in triplicate with the Board of Immigration Appeals. If oral argument upon a motion is desired, it shall be so stated. The Board of Immigration Appeals, in its discretion, may grant or deny oral argument."

The petitioner, as alleged in the petition for habeas corpus, had been deprived of due process in the deportation proceeding. As soon as apprised of his rights by employment of counsel, he could move to have his proceeding reopened. Such motion was timely made after an order had been entered by the Board of Immigration Appeals (*supra,* Section 90.11), where he could not present his case properly before such order was made because he had been deprived of due process.

POINT VI

The application for a writ of certiorari should be granted.

This Court has granted certiorari in cases involving civil right where important questions of constitutional law are involved. Said this Court in *Canizio* v. *The People of the State of New York,* 327 U. S. 82, 66 S. Ct. 699:

> "We granted certiorari because the case presents an important question involving the right to counsel under the Constitution of the United States."

The petitioner invokes this rule in his behalf in addition to the further rule of this Court that it will set at rest conflicts of decision between the Circuit Courts of Appeal.

The petitioner, having gone through a criminal proceeding and court review of the deportation proceeding without ever having been heard on the merits, prays for his day in court.

Respectfully submitted,

GUNTHER JACOBSON,
Counsel for Petitioner.